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Supreme Court, U.S.
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No.

In the Supreme Court of the United States
October Term, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY of the STATE of CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Appendix to Jurisdictional Statement
Volume II

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157

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON AND THOMES J. D'AMORE, JR.	:	
v.	:	CIVIL NO. H 84-548 (JAC)
JULIA H. TASHJIAN, Secretary of the State of the State of Connecticut	:	

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RULING ON DEFENDANT'S MOTION
TO DISMISS AND PLAINTIFFS'
MOTION FOR SUMMARY JUDGEMENT

JOSE A. CABRANES, District Judge:

This case brings into dramatic conflict the power of states to regulate primary elections and the right of political parties to freedom of association under the First Amendment to the United States Constitution. The State of Connecticut has asserted a broad and

discretionary claim to authority over the activities of political parties based on their integral involvement in the selection of candidates for public office. Plaintiffs acknowledge that political parties are not typical voluntary organizations immune from state regulation and constitutional strictures,[3] but maintain that freedom of association would prove an empty guarantee if states were unrestrained in their ability to dictate eligibility requirements for participation in party's candidate selection process.

The action challenges the validity of Connecticut's "closed primary law," Section 9-431 of the Connecticut General

Statutes, which prohibits voters who are not enrolled in a political party from participating in primary elections.[4] This is the first case to present the situation in which a political party challenges a closed primary law on First Amendment grounds. Plaintiffs are the Republican Party of the State of Connecticut, the Chairman of the Republican State Central Committee, Thomas J. D'Amore, Jr., and the Connecticut Republican Party's principal federal elected officials, United States Senator Lowell P. Weicker, Jr. and United States Representatives Stewart B. McKinney and Nancy L. Johnson. The defendant is Julia H. Tashjian, Secretary of the State of the

State of Connecticut. ("Connecticut" or "defendant"), who is responsible for administering the challenged statute. Plaintiffs allege that Section 9-431 infringes their First Amendment right to associate for the advancement of common political objectives. They seek to have this court declare the statute unconstitutional and enjoin its enforcement. In 1976, the constitutionality of the very statute at issue in this case was challenged by unaffiliated voters who desired to participate in primary elections against the express wishes of political parties. See Nader v. Schaffer, 417 F. Supp. 837 (D. Conn.)(three-judge court), aff'd mem., 426 U.S. 989 (1976). The

court in Nader held that Connecticut was justified in preventing these unwanted intruders from disrupting party primaries. In this case, the Connecticut Republican Party is no longer a willing beneficiary of the protections afforded by the state's closed primary law. The party now seeks to open its candidate selection process to unaffiliated voters. Accordingly, the concern with barring unwelcome "outsiders" that motivated the result in Nader is not present here.

On January 14, 1984, the delegates to the state convention of the Connecticut Republican Party approved an amendment to the party rules permitting unaffiliated voters to join with enrolled

Republicans in voting for candidates for the offices of the United States Senator, United States Representative, Governor and the gubernatorial "underticket" in primary elections.[5] The amendment would not affect voter qualifications in other Republican Party primary elections, including those for seats in the Connecticut Senate and House of Representatives; enrollment in the party would continue to be a requirement for voting in those primaries. The amended party rule is in direct conflict with Section 9-431.

Because Section 9-431 substantially interferes with plaintiffs' associational rights, it is subject to strict judicial scrutiny. The statute can thus be upheld

only if it is necessary to advance compelling state interests and if it advances those interests in the manner least restrictive of the ability of the Republican Party to structure its candidate selection process in the way it deems appropriate.[6]

In the circumstances of this case, the purposes purportedly served by Section 9-431 -- the prevention of raiding, the avoidance of voter confusion, and the preservation of the two-party system -- are not compelling state interests justifying the substantial burden that the statute imposes on the exercise of plaintiffs' right of political association. Accordingly, Section 9-431 constitutes an

impermissible infringement on First Amendment rights and it cannot be applied to prevent the Republican Party from including unaffiliated voters in certain of its primaries.

The court today holds not that participation by unaffiliated voters in party primaries necessarily is constitutionally required, but that a party's decision to permit unaffiliated voters to participate in its primaries is constitutionally protected.

Discussion

Although the memoranda filed by the parties are lengthy, this is not a

particularly complex case. The principal issues are relatively straightforward. They are, first whether the dictates of Article I, section 2 of the Constitution and the Seventeenth Amendment (defining voter eligibility in elections for the federal House of Representatives and Senate, respectively) are applicable to primary elections; second, whether Article I, section 2 and the Seventeenth Amendment require that eligibility to vote in congressional elections be "absolutely symmetrical" to eligibility to vote in state legislative elections; third, whether Article I, section 4 (vesting in states the power to regulate the time, place, and manner of holding

congressional elections) grants states virtually unreviewable power to regulate the conduct of primaries; fourth, whether the challenged statute constitutes so insubstantial an imposition on the right of association that courts need not strictly scrutinize the statute under the First and Fourteenth Amendments; and fifth, whether the interests proffered by Connecticut in support of its closed primary law are legitimate and sufficient to outweigh the burden that the statute imposes on plaintiffs' right of political association. The court will address each of these questions in turn.

I. Political Parties and State Action

Article I, section 2, clause 1 of the United States Constitution provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for electors of the most numerous Branch of the State Legislature.

The Seventeenth Amendment employs virtually identical language to delineate the class of persons eligible to vote in elections for the United States Senator.[7]

Connecticut maintains that the Republican Party rule at issue in this litigation violates these constitutional provisions by permitting unaffiliated

voters to participate in primaries for congressional offices while denying them a similar opportunity to vote in primaries for seats in the Connecticut General Assembly. Putting aside for the moment Connecticut's dubious interpretation of the relevant constitutional provisions, it is not apparent that Article I, section 2 and the Seventeenth Amendment have any application to primary elections whatsoever. Connecticut uncritically asserts that "the activities of a political party constitute state action" and thus that "there can be no question" that Article I, section 2 applies to primaries. Defendant's Reply to Plaintiffs' Memorandum Dated June 27, 1984 in Opposition to

Motion to Dismiss (filed July 9, 1984) ("Defendant's Reply Memorandum") at 4. This conclusion rests on the selective use of passages from Supreme Court decisions taken out of context, a mischaracterization of dicta in United States v. Classic, 313 U.S. 299 (1941), and an unwarranted extension of the so-called White Primary Cases.[8]

The White Primary Cases, in which the Supreme Court overturned a series of increasingly subtle tactics employed to exclude blacks from participating in the Texas Democratic Party's candidate selection process, do not stand for the proposition that all actions of political parties constitute state action without

regard to the surrounding circumstances. See O'Brien v. Brown, 409 U.S. 1, 4 n.1 (1972); Kester, Constitutional Restrictions on Political Parties, 60 Va. L. Rev. 735, 756-760 (1974); see also Ripon Society v. National Republican Party, 525 F.2d 567, 598-600 (D.C. Cir. 1975) (Tamm, J., concurring), cert. denied, 424 U.S. 933 (1976). The White Primary Cases concerned discrimination against members of a suspect class. They thus reflect the principle that, in cases of invidious discrimination, a lesser degree of state involvement in private conduct is sufficient to trigger constitutional scrutiny. See, e.g., Janusaitis v. Middlebury Volunteer Fire Department,

607 F.2d 17, 23, 27 n.16 (2d Cir. 1979).[9] No discrimination against a "discrete and insular minority," United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), present on the facts of this case.

Absent a malfunctioning of the machinery of the Connecticut Republican Party that results in a perversion of its electoral processes, such as the arbitrary exclusion of members of particular ethnic or religious groups, there is no basis for the state to interfere in the party's decisionmaking. The party's internal processes will supply any necessary corrective. "Where...all persons who share the party's basic philosophy

can participate more or less equally in fashioning party rules, there is no reason to set those rules aside merely because a legislative majority thinks it can do a better job." Brief of Amici Curiae American Civil Liberties Union and Connecticut Civil Liberties Union Foundation in Support of Plaintiffs' Motion for Summary Judgment (filed June 27, 1984) at 5; see generally J. Ely, Democracy and Distrust 135-179 (1980).[10]

Furthermore, the White Primary Cases were decided at a time when Texas was a one-party state and the Democratic Party nomination was tantamount to election to public office. See Ripon Society v. National Republican Party, supra, 525

F.2d at 598 (Tamm, J., concurring). Defendant could not seriously contend that anything resembling that situation is true of Connecticut at this time. Read as they must be in light of their factual underpinnings, the White Primary Cases do not support defendant's far-reaching view that the activities of political parties always constitute state action.

Connecticut's reliance on United States v. Classic, supra, is similarly misplaced. In Classic, the Supreme Court reversed the dismissal of an indictment against a Louisiana election official for fraudulently tabulating ballots in a primary election. The Court reasoned that primaries were such an "integral part" of

the electoral process that the right to vote implicit in Article I of the constitution, see Ex Parte Yarbrough, 110 U.S. 651, 662-664 (1884), extended to them. Kester, supra, 60 Va. L. Rev. at 745-746. In dicta, the Court suggested that a party official also could be prosecuted for miscounting ballots in a primary election because the right to vote in congressional elections guaranteed by Article I is protected against state and private interference alike. United States v. Classic, supra, 313 U.S. at 315.

Any argument, based on this dictum in Classic, that the activities of political parties are, by definition, state

action, is unfounded. See Developments in the Law -- Elections, 88 Harv. L. Rev. 1111, 1158-1159 (1975); L. Tribe, American Constitutional Law § 13-23, at 789 n.16 (1978). As Judge Tamm observed in his concurrence in Ripon Society v. National Republican Party, supra,

> the Classic holding was firmly grounded in the Article 1 protection of the right to vote in congressional elections, which also extends to private interferences, and thus cannot stand for the proposition that all nominating procedures closely related to general elections constitute state action.

525 F.2d at 599.

Defendant also argues that Article I, section 2 is applicable to political parties in primary elections even absent

a finding of state action. See Defendant's Memorandum in Support of Motion to Dismiss (filed June 21, 1984) ("Defendant's memorandum") at 17-18. This argument is premised on the isolated statement in Classic that "the constitutional command...is secured against the action of individuals as well as of states." 313 U.S. at 315. Reading "the constitutional command" to mean its postulated "absolute symmetry" requirement, Connecticut concludes that Article I, section 2 directly prohibits political parties from establishing voting qualifications in primaries for congressional offices different from those for state legislative offices.

This analysis is not borne out by a close reading of the opinion in Classic. It is apparent that in referring to "the constitutional command," the Court was speaking of the right to vote implicit generally in Article 1 of the Constitution and not any alleged constitutional prescription of "absolute symmetry" in the definitions of voter eligibility in congressional and state legislative elections. See Ex Parte Yarbrough, supra, 110 U.S. at 662-664; United States v. Mosley, 238 U.S. 383, 386 (1915). It is the right to vote that is "without restriction or limitation" and thus protected from private as well as state-imposed interference.

Connecticut's suggestion that the phrase "the constitutional command" in Classic refers to the explicit terms of Article 1, section 2, adopting state voter qualifications for use in congressional elections, is groundless. Those provisions, by their terms, have no logical application to the conduct of private persons or entities.[11]

II. The Meaning of Article I, Section 2

Even assuming arguendo the existence of some principled basis for applying Article I, section 2 and the Seventeenth Amendment to primary elections, Connecticut has failed to demonstrate that

these constitutional provisions mandate "absolute symmetry" or "unqualified symmetry and equality" in voter qualifications for congressional and state legislative primaries. Defendant's painstaking review of the history of Article I, section 2 demonstrates only that nationally uniform voter qualifications for congressional elections were rejected by the Constitutional Convention in 1787 in favor of the diverse standards utilized by the states themselves in electing the corresponding branches of their legislatures. This expedient eliminated the difficulty of identifying a single standard mutually acceptable to all states[12] and insured that the House

of Representatives would be elected by "the great body of the people of the United States." The Federalist No. 57, at 385 (J. Madison) (J. Cooke ed. 1961). The Founding Fathers were concerned that discrimination against federal interests might lead states to restrict the franchise in congressional elections, "render[ing] too dependent on the State Governments, that branch of the Federal Government, which ought to be dependent on the people alone." The Federalist No. 52 at 354 (J. Madison) (J. Cooke ed. 1961). In tying eligibility to vote in congressional elections to the qualifications for electors of the most numerous branches of state legislatures, the

drafters of the Constitution sought to prevent states from restricting popular participation in congressional elections; this goal was accomplished by the requirement that any such restriction of the franchise in congressional elections be accompanied by an identical narrowing of the electorate in state legislative contests.

None of this suggests the slightest concern with symmetry in the abstract, as a value meriting protection in its own right. Neither the language nor the history of Article I, section 2 precludes a more expansive classification of eligible voters in congressional as opposed to state legislative elections, and

defendant's repeated insistence that the Constitution requires "absolute symmetry" does not make it otherwise. To guarantee that the House of Representatives would be elected by the general populace, the framers devised a method of dissuading states from capriciously restricting the franchise in congressional elections. Those qualified to vote for members of the most numerous branches of state legislatures are entitled to vote for members of the House of Representatives; a more restrictive standard is constitutionally impermissible. It does not logically follow from this, however, that a less restrictive standard is similarly proscribed. In fact, it is arguable that

a standard that opens the political process by including greater numbers of voters in congressional primaries furthers, rather than undermines, the democratic values underlying Article I, section 2.

Defendant's unexplained assertion that "the power to discriminate in favor of 'openness' implies the power to discriminate for narrow purposes," Defendant's Memorandum at 9, is without merit. The ability to expand but not contract the pool of eligible voters in congressional primaries is the functional analogue of Justice Brennan's famous "ratchet" theory concerning the power of Congress to enforce the Fourteenth Amendment. Under that theory, Congress may

enact laws that strengthen guarantees under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as interpreted by the Supreme Court, but may not dilute those guarantees. See Katzenbach v. Morgan, 384 U.S. 641, 651 & n.10 (1966).[13] In a similar vein, although states under no circumstances may limit rights beyond constitutionally required minima, they may in certain instances extend the reach of rights guaranteed by the Constitution.[14]

III. Article I, Section 4

Connecticut maintains that Article I, section 4 of the Constitution -- which vests in state legislatures the power to

regulate the time, place and manner of holding congressional elections[15] -- authorizes states to trump the choices of a political party regarding the structure of its candidates selection process. See Defendant's Memorandum at 36-39. The weakness of this argument is revealed by the paucity of authority marshaled in support of it. Connecticut places principal reliance on dicta in Storer v. Brown, 415 U.S. 724, 730 (1974), to the effect that "[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster" under existing Supreme Court precedents. This is hardly a ringing affirmation of the expansive view of state regulatory power urged by Connecticut.

Connecticut then embarks on an extended review of election law cases in search of pronouncements arguably supportive of the position that state power to regulate primary elections knows few bounds. This exercise accomplishes little but reiteration of the basic principle that states are empowered to enact laws regulating primary elections if, and only if, such legislation does not transgress some specific constitutional limitation. See Rodriquez v. Popular Democratic Party of Puerto Rico, 457 U.S. 1, 13 (1982) ("[a]bsent some clear constitutional limitation"); Oregon v. Mitchell, 400 U.S. 112, 125 (1970) ("within the limits of the

constitution").[16] The right to associate with others for the advancement of common political beliefs or objectives is just such a constitutional limitation on the authority of government. See Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973); Democratic Party of the United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 121-122 (1981).

IV. The Standard of Review

Connecticut concedes that "substantial burdens on the right to ... associate for political purposes can only be justified if they serve a compelling state interest." Defendant's Memorandum at 67, citing Nader v. Schaffer, supra,

417 F. Supp. at 849. The state maintains, however, that Section 9-431 imposes only incidental burdens on plaintiffs' freedom of political association and thus that the statute need only be rationally related to the achievement of a legitimate state purpose in order to pass constitutional muster. See Defendant's Reply Memorandum at 9-12.

In contending that Section 9-431 is subject to this deferential standard of review, defendant relies solely on cases involving challenges by individual voters to state-imposed party affiliation requirements that were not opposed by the parties themselves. See Defendant's Memorandum at 69 n.9. Put very simply, this is a different case.[17]

The argument that a party affiliation requirement constitutes only a de minimis burden on associational rights rests on the notion that any "communality" of interests "between the excluded individual and the group from which he is excluded," Development in the Law -- Elections, supra, 88 Harv. L. Rev. at 1166, is belied by the independent voter's refusal "to express a commitment to the party and to the party's basic ideas," Defendant's Memorandum at 64. As stated by one commentator:

> There can be little objection to a requirement that those wishing to vote in a party's primary profess that, as of that time, they are affiliated with that party. Absent a willingness to profess such affiliation, it would be tenuous

> to assert that substantial associational rights were being abridged; without a communality of interests, there is little association to abridge.

L. Tribe, supra § 13-23, at 793, quoted in Defendant's Memorandum at 68; see also Nader v. Schaffer, supra, 417 F. Supp. at 843.[18]

The analysis is persuasive in the case of challenges by independent voters to state laws excluding them from participation in primary elections. The ability to comply with the essentially pro forma requirement of affiliation is exclusively in the hands of the complaining independent voter. Moreover, the countervailing right of a political party to

be free from unwelcome intrusions must be weighed in the balance. Finally, the independent voter's claim to a "communality" of interests with the party in whose primary he seeks to vote is indeed tenuous in light of his refusal to take the simple and largely formalistic step of affiliating with the party.

The analysis is substantially less persuasive when a party is challenging a state law excluding independent voters from its primaries. As noted above, independent voters possess the ready means to overcome the burden on associational rights imposed by a closed primary law. The same cannot be said of the party itself. In cases relied upon by

Connecticut, the plaintiffs were unaffiliated voters who sought to participate in primary elections having intentionally failed to comply with statutory prerequisites for voting in such elections.[19] Accordingly, some doubt was cast upon their asserted "communality" of interests with the party in whose primary they sought to vote. In this case, on the other hand, there is nothing the Connecticut Republican Party can do within the terms of Section 9-431 to permit unaffiliated voters to participate in its primaries. The statute's affiliation requirement is thus a real and formidable obstacle to a party which seeks to broaden its appeal by including unaffiliated

voters in its candidate selection process.

The analysis relied on by defendant also presupposes that parties are the willing beneficiaries of laws that preserve their institutional integrity by barring "gatecrashers" with adverse political views from sabotaging their decisionmaking. See Ray v. Blair, 343 U.S. 214, 221-222 (1952) (states may protect parties "from intrusion by those with adverse political principles").[20] This is not the situation when a political party is contesting a state-imposed affiliation requirement, in which case the party obviously does not welcome "protection" against efforts by outsiders to

participate in the party's candidate selection process. If the Connecticut Republican Party opts to invite "outsiders" to vote in its primaries, these "outsiders," by definition, are not intruders.

Defendant's reliance on Democratic Party of the United States v. Wisconsin ex rel. LaFollette, supra, stands the case on its head. When the Supreme Court observed that "freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association," 450 U.S. at 122 (citations omitted), it was speaking of the power not of states but of political parties. As one commentator has noted, it

is unclear "[w]hat meaning...freedom of association [can] have if the association has no control over who can participate in its decisionmaking." Note, Democratic Party v. Wisconsin: May States Impose Open Primary Results Upon a National Party Convention?, 59 Denver L.J. 611, 620 (1982) (emphasis added).

Moreover, while there may be justification for rejecting claimed violations of associational rights asserted by voters who refuse to take the mechanical step of affiliating with the party, it does not follow that only those persons who have enrolled in a political party are capable of "shar[ing] the interests and persuasion that underlie the

association's being," Democratic Party of the United States v. Wisconsin ex rel. LaFollette, supra, 450 U.S. at 122 n.23, quoting L. Tribe, supra,. § 13-23, at 791. Political beliefs are not susceptible to such rigid compartmentalization. See Rosario v. Rockefeller, 410 U.S. 752, 769 (1973) (Powell, J., dissenting) ("the political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership"); Note, The Constitutionality of Non-Member Voting in Political Party Primary Elections, 14 Willamette L.J. 259, 290 (1978). It is not for the Connecticut legislature to determine whether or not the goals and aspirations of the

Connecticut Republican Party can be shared by independent voters who, for whatever reason, have chosen not to become members of that party.

The ultimate goal of any political party is to take control of the levers of government in order to achieve its objectives. See Storer v. Brown, supra, 415 U.S. at 745. In order to accomplish this goal, a minority party such as the Connecticut Republican Party[21] may wish to nominate candidates who will attract support in the general election from persons who are not members of that party. See Bode v. National Democratic Party, 452 F.2d 1302, 1309 (D.C. Cir. 1971), cert. denied, 404 U.S. 1019 (1972). The

party rule at issue in this litigation is designed to increase the likelihood that candidates with such broad appeal will emerge from the party's primaries. Any effort by the state to substitute its judgment for that of the party on this question -- the question of who is and is not sufficiently allied in interest with the party to warrant inclusion in its candidate selection process -- substantially impinges on First Amendment rights.[22] Accordingly, Section 9-431 must be subjected to strict judicial scrutiny under the First Amendment.

V. The Purported Interests of the State

Under the strict scrutiny

Under the strict scrutiny analysis the court is thus required to undertake, Section 9-431 can be upheld only if it is narrowly tailored to serve compelling state interests. Connecticut maintains that its closed primary law furthers a number of "important state interests, all of which may be classified under the general rubric of 'preserving the integrity of the electoral process.'" Defendant's Memorandum at 75, quoting Democratic Party of the United States v. Wisconsin ex rel. LaFollette, supra, 450 U.S. at 121. These interests are principally three: (1) preventing raiding; (2) avoiding voter confusion; and (3) promoting a stable two-party system. Id.

at 76, quoting Developments in the Law -- Elections, supra, 88 Harv. L. Rev. at 1168-1169; see Nader v. Schaffer, supra, 417 F. Supp. at 845. None of these interests is sufficient to outweigh the burden on plaintiffs' associational rights imposed by Section 9-431.

Raiding is a practice "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." Rosario v. Rockefeller, supra, 410 U.S. at 760. Connecticut's avowed interest in preventing raiding is of questionable relevance in this case, inasmuch as the party rule at issue permits only unaffiliated

voters to participate in Republican Party primaries; no such invitation has been extended to Democrats or members of other political parties. In any event, the spectre of Democratic voters severing ties with their party en masse in order to mount a raid on a Republican primary is effectively eliminated by Section 9-59 of the Connecticut General Statutes (a law not directly at issue here), which provides that a person affiliated with one party may not vote in the primary of another party within six months after leaving his original party.[23]

Any professed concern with raiding by unaffiliated voters -- an anomalous concept to begin with -- is contradicted

by Public Act 84-118, effective January 1, 1985, which permits unaffiliated voters to affiliate with a political party up to one day prior to a primary election.[24] This statute already has eliminated any real obstacle to "raiding" by independent voters bent on disrupting the candidate selection process of a political party.

The second interest articulated by defendant in support of Section 9-431, that of avoiding voter confusion "by ensuring that the candidate who wins a party primary is that candidate who best represents the views of party members," Defendant's Memorandum at 90, is wholly illegitimate.[25] Connecticut may well

have an interest in "fostering an informed electorate." Defendant's Memorandum at 90'; see Anderson v. Celebrezze, 460 U.S. 780, 796 (1983). However, that interest does not authorize the state to gauge, much less determine, whether candidates for public office adequately reflect the views of their parties. Connecticut presents no reasoned argument in support of its bald assertion that is has a legitimate interest in protecting "voters who rely on party labels as representatives of certain ideologies." Defendant's Memorandum at 91. It is not obvious that unthinking reliance on party labels is a practice that ought to be encouraged in any event, but protecting

voters who, in a general election, reflexively pull a party's lever in the voting booth, and may thereby be "misled," simply does not rise to the level of a compelling state interest. Whether to pursue an electoral and political strategy that assures voters that party nomination implies a recognizable ideology (or other types of political values) is a matter for each political party, not the state, to decide. Connecticut has no compelling interest in so rigidly constraining the contours of party politics.[26]

The third interest advanced by Connecticut to justify its closed primary law, apparently closely related to the

second, is maintenance of the stability of the state's two-party system. Viewing the pivotal question as "which primary system [i.e., "open" or "closed"] is better," Connecticut maintains that the legislature's choice of a closed primary represents the best judgment of political scientists as to "the means of emphasizing the differences between the parties...and thereby encouraging voting." Defendant's Reply Memorandum at 13 & n.7.[27] Defendant has misconstrued the issue before this court.[28] The controversy does not center on which form of primary election is more desirable, but rather, on whether there are compelling state interests to justify imposition of

a closed primary structure on an objecting party. It is not apparent that maintaining the two-party system within its present contours rises to the level of a compelling state interest sufficient to validate the limitation on First Amendment rights present in this case. Much less is it clear that the state's imposition of a closed primary structure on an unwilling party furthers the state's purported interest.

Connecticut has failed to explain how permitting unaffiliated voters to participate in Republican primaries will lead to the splintered parties and unrestrained factionalism[29] that it professes to fear, or how any such result

would justify a substantial infringement on plaintiffs' right of association. The Connecticut Republican Party's attempt to broaden its appeal by including unaffiliated voters in its primaries, whatever its practical effects, cannot be foreclosed on defendant's flimsy and unsupported assertion that this action somehow will "discourage a politics of coalition and accommodation," Defendant's Memorandum at 81, quoting A. Bickel, Reform and Continuity 21-22 (1971).

To the extent that Section 9-431 is defended on the grounds that it preserves the Connecticut Republican Party in its present form, the defendant's position is patently untenable. Absent an invidious

design effectively to limit participation in the electoral process, the efforts of a political party to alter its character -- indeed, to reshape itself altogether -- by redefining who may participate in its affairs is no concern to a state.

There is nothing legitimate or reasonable, much less compelling, about an asserted state interest in freezing the parties in status quo.[30] Whether or not permitting unaffiliated voters to participate in primary elections somehow will "destabilize" the Republican Party is a matter for Republicans to consider; it is not an appropriate subject for state legislation. Whether the course chosen by a party leads to success and power or to

failure and decline, the First Amendment ensures that that course will be the choice of the party, not the state.

Conclusion

Section 9-431 of the Connecticut General Statutes imposes substantial burdens on plaintiffs' right of association under the First and Fourteenth Amendments of the United States Constitution and is not supported by compelling state interests. Accordingly, as applied to the Republican Party rule permitting unaffiliated voters to participate in certain Republican primaries, the statute abridges the right of association

guaranteed by the First Amendment and that abridgement must be enjoined. Plaintiffs' motion for summary judgment is therefore granted and defendant's motion to dismiss is denied.

It is so ordered.

Dated at Hartford, Connecticut, this 5th day of December, 1984.

Jose A. Cabranes
United States District Judge

NOTES

1. Due to the possible implications of this case for primary elections and the two-party system generally, the court extended an invitation to interested persons and organizations to participate as amici curiae. See Order (filed May 23, 1984). As the court has noted on previous occasions, the decision to invite these parties to participate as friends of the court was in no way motivated by questions concerning the capacity of existing counsel adequately to represent the interests of their clients. Rather, these arrangements -- made without objection from either party -- reflected the shared conviction that this lawsuit may possess broad-ranging significance and that the court would benefit from the presentation of widely divergent ideological, political and professional viewpoints on the constitutional issues in the litigation. Those who elected to participate as amici curiae argued generally in favor of the position asserted here by plaintiffs. See Certified Official Transcript of Oral Argument of July 5, 1984 (filed Dec. 4, 1984) ("Tr.") at 4-6.

2. The amici curiae represented by Professor Gottlieb are professors of political science at Yale University, Williams College, the State University of New York at Albany, Northwestern University, the Graduate School of Public Affairs at the State University of New York at Albany, and Southern Illinois University at Carbondale, respectively.

   The statement submitted by these political scientists contained interesting arguments grounded in history and public policy. In the final anaylsis, however, the determination of issues in this case must be made exclusively in the basis of constitutional principles.

3. Compare Seergy v. Kings County Republican County Committee, 459 F.2d 308, 313-314 (2d Cir. 1972) ("political parties are not immune from constitutional limitations merely because they are private groups") with Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 167 (1972) (racially discriminatory guest policies of private club are not within purview of Equal Protection Clause of Fourteenth Amendment).

4. Section 9-431 provides, in pertinent part:

> No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be . . .

5. The rule provides:

> Any elector enrolled as a member of a Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer.

6. See Cousins v. Wigoda, 419 U.S. 477, 489 (1975); Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

7. The Seventeenth Amendment provides, in pertinent part:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

8. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); United States v. classic, 313 U.S. 299 (1941); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

9. See also Girard v. 94th Street & Fifth Avenue Corp., 530 F.2d 66, 69 (2d Cir.), cert. denied, 425 U.S. 974 (1976); Weise v. Syracuse University, 522 F.2d 397, 405 (2d Cir. 1975); Jackson v. Statler Foundation, 496 F.2d 623, 628-629 (2d Cir. 1974), cert. denied, 420 U.S. 927 (1975); Lefcourt v. Legal

Aid Society, 445 F.2d 1150, 1155 n.6 (2d Cir. 1971); Stewart v. New York University, 430 F. Supp. 1305, 1311 n.6 (S.D.N.Y. 1976).

10. Cf. Mrazek v. Suffolk County Board of Elections, 630 F.2d 890, 897 n.11 (2d Cir. 1980) ("The parties are best situated to define the proper constituencies of their nominating delegates, and these determinations should not be invalidated unless...[the process is] utilized to exclude or disadvantage discrete groups or minorities.").

11. It is possible that the notion of "absolute symmetry" so vigorously embraced by defendant, if adopted by the courts, could have some unexpected, not to say bizarre, consequences, as suggested by the following exchange between the court and plaintiffs' counsel during oral argument:

> Mr. Elliot: The United States Constitution requires only that the U.S. Senate electors and the U.S. House electors have the same qualifications as electors do who vote for the State House of Representatives, and there is nothing in

this case to indicate that that is not so . . . .

The State argues [,however,] that the U.S. Constitution requires that everyone who can vote for the State House of Representatives must be able to vote in the Republican primary for U.S. Representative and U.S. Senator . . . .

The State's argument would thus invalidate Section 9-431 because it limits the right to vote in Democratic primaries to Democrats and in Republican primaries to Republicans, and does not open up all of the primaries to all of the voters who can vote for the State House of Representatives.

The Court: But then your argument is that the so called open primary is constitutionally mandated?

Mr. Elliot: No. Our argument is that the State's argument is that the open primaries

> is constitutionally mandated so that all voters in all parties can vote in each par;ty's primaries.

Tr. 21-23 (emphasis supplied). See also Tr. 25-26, 29-30, 38-40, 43-44.

12. I Story, Commentaries on the Constitution of the United States § 584, at 418 (T. Cooley 4th ed. 1873) ("the reducing of the different qualifications, already existing in different States, to one uniform rule, would have been a difficult task, even to the convention itself, and would be dissatisfactory to the people of different States").

13. See also Oregon v. Mitchell, 400 U.S. 112, 249 n.31 (1970) (Brennan, J., concurring in part and dissenting in part); G. Gunther, Cases and Materials on Constitutional Law 1096-1104 (10th ed. 1980); Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1230-1231 & n.63 (1978). For the related views of Judge Jon O. Newman, see note 14, infra, and accompanying text.

14. See Newman, The "Old Federalism": Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity, 15 Conn. L. Rev. 21, 25 (1982).

15. Article I, section 4, clause 1 provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senator.

16. The concept is best conveyed by defendant in a single sentence:

> In summary, the State of Connecticut has the power to enact laws, within constitutional limits, setting qualifications for voting in a primary election.

Defendant's Memorandum at 64 (emphasis added).

17. Defendant here runs afoul of the principle that cases must be construed in light of their facts.

A similar criticism can be made of the arguments of Professor Ronald Rotunda, on which defendant relies. See Defendant's Reply Memorandum at 11 n5. Professor Rotunda attributes to plaintiffs the position that "[e]ven though a nonparty member could not force an open primary and invalidate...[a state closed primary] law, the political party could, if it chooses to do so." He then concludes that such a position "does not find support in the case law." Letter from Ronald D. Rotunda to Judge Jose A. Cabranes (dated June 15, 1984) at 2. This conclusion is unpersuasive inasmuch as no reported case has ever addressed the situation in which a political party, rather than an independent voter, challenges a closed primary law on First Amendment grounds.

18. Cf. Democratic Party of the United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 133 (1981) (Powell, J., dissenting) ("As party affiliation becomes this easy for a voter to change in order to participate in a primary election, the difference between open and closed

primaries loses its practical significance.").

19. See, e.g., Rosario v. Rockefeller, 410 U.S. 752 (1973); Ray v. Blair, 343 U.S. 214 (1952); Nader v. Schaffer, 417 F. Supp. 837 (D. Conn.) (three-judge court), aff'd mem., 426 U.S. 989 (1976).

20. See also Gottlieb, Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case, 11 Hofstra L. Rev. 191, 198 (1982).

21. As of October 1983, there were 659,268 registered Democrats, 425,695 registered Republicans, and 532,723 registered but unaffiliated voters in the State of Connecticut. Joint Statement of ¶ 1 (filed June 6, 1984). As counsel for plaintiffs asserted at oral argument, "the Republican Party recognizes that in general elections, because of the ...breakdown of Republican, Democrat and unaffiliated voters, that for the Republican Party to win in general elections it needs the support of unaffiliated voters." Tr. 56; see also Tr. 66; note 28, infra, and accompanying text.

22. As the Supreme Court noted in Democratic Party of the United States v. Wisconsin ex rel. LaFollette, supra,

> [i]t is for the National Party -- and not the Wisconsin Legislature or any court -- to determine the appropriate standards for participation in the Party's candidate selection process.

450 U.S. at 124 n.27; see also Opinion of the Justices to the Governor, 385 Mass. 1201, 1207-1208, 434 N.E. 2d 960, 963-964 (1982), appeal dismissed sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983). But see id. at 1063 & n.3 (Stevens, J., dissenting) (observing that the Democratic Party case involved a state's attempt "to control delegates in a nationwide party contest"); Rotunda, Constitutional and Statutory Restrictions on Political Parties in the Wake of Cousins v. Wigoda, 53 Tex. L. Rev. 935, 950-951 (1975) (arguing that statutes regulating national political parties constitute extraterritorial extensions of state jurisdiction and must

therefore be justified by "special Interests").

23. Section 9-59 of the Connecticut General Statutes provides, in pertinent part:

> . . . Any elector whose name has been transferred from one enrollment list to another or who has applied for erasure . . . shall not be entitled to vote in a . . . primary of any party . . . for a period of six months from the date of the filing of his application for transfer or for erasure.

24. Public Act 84-118 provides, in pertinent part:

> . . . The application shall be effective as of the date of its execution and any person making application for enrollment in such manner shall immediately be entitled to privileges of party enrollment unless he executes the application for enrollment after [the

> fourteenth] TWELVE O'CLOCK NOON ON THE LAST BUSINESS day before a primary, in which case he shall be entitled to the privileges of party enrollment immediately after the primary . . . .
>
> 1984 Conn. Legis. Service No. 4, at 10 (West) (bracketed language deleted from and capitalized language added to prior statutory provision).

25. Comments in Nader v. Schaffer, supra, 417 F. Supp. at 845, to the effect that a state has a "legitimate ... interest in protecting the overall integrity of the historic electoral process" cannot be employed to support defendant's arguments in this litigation. The Nader case involved a challenge by independent voters to the affiliation requirement of Section 9-431 and thus the central concern was the prevention of raiding. A conviction that political parties are ill-equipped to protect themselves from the disruptive effects of raiding led the court to conclude that "in the regulated situation, the state has a legitimate interest in protecting party members' associational rights,

by legislating to protect the party 'from intrusion by those with adverse principles.'" Id., quoting Ray v. Blair, supra, 343 U.S. at 221-222 (1952).

26. A logical but unarticulated extension of defendant's argument would permit a state to displace a party's choice of candidates whenever the state determines that the candidate's views are so antithetical to those of the party that permitting him to run on the ticket in the general election would engender "voter confusion." While such a result would comport with the notion that political parties are mere functionaries carrying out tasks delegated to them by the state, it is utterly inconsistent with the freedom of political parties to associate for the advancement of common beliefs guaranteed to them by the First Amendment.

27. Connecticut's counsel has asserted that it would be "a very legitimate interest of the State" to enact legislation designed to foster party differentiation along ideological and other political lines. See Tr. 80-81.

28. The amici curiae political scientists correctly note that the real

issue is the "right of political parties to choose the basis on which to seek the support of the American public." Statement of F. Christoper Arterton, et al. and Supporting Memorandum of Law (filed June 26, 1984) at 1.

29. In any event, it is possible that the challenged rule actually would decrease the likelihood of political fragmentation by encouraging independent voters to participate in the affairs of an existing political party. As one commentator has noted:

> Inasmuch as parties in competitive systems seek to win the electoral support of groups that may not be particularly predisposed toward political participation, the parties serve to pull these groups into more active involvement in the polity and thus to integrate them into the political system and its processes.

Dawson, Social Development, Party Competition, and Policy, in The American Party Systems 208-209 (W. Chambers & W.D. Burnham eds. 1967).

"The principle is plain that there can be no interference with freedom of expression on the general ground that it will lead to social change, or change at the wrong rate, or in the wrong direction." T. Emerson, The System of Freedom of Expression 47 (1970).

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of August one thousand nine hundred and eighty-five

Present:

HON. IRVING R. KAUFMAN,

HON. JAMES L. OAKES,

HON. RICHARD J. CARDAMONE,

Circuit Judges,

REPUBLICAN PARTY OF THE
STATE OF CONNECTICUT,
LOWELL P. WEICKER, JR.,
STEWART B. McKINNEY,
NANCY L. JOHNSON and
THOMAS J. D'AMORE, JR.,

Plaintiffs-Appellees,

-against- 85-7011

JULIA H. TASHJIAN,
Secretary of the State of
the State of Connecticut,

Defendant-Appellant,

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is Affirmed in accordance with the opinion of this Court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH,
Clerk,

by: /s/ Edward J. Guardaro,
Deputy Clerk

FILED SEPTEMBER 20, 1985

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR., Plaintiffs-Appellees,	:	DOCKET NO. 85-7011
V.	:	
JULIA H. TASHJIAN, SECRETARY OF THE STATE OF CONNECTICUT. Defendant-Appellant.	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that JULIA H. TASHJIAN, SECRETARY OF THE STATE OF CONNECTICUT, the defendant-appellant above named, hereby appeals to the Supreme

Court of the United States from the judgment of the U.S. Court of Appeals for the Second Circuit entered in this action August 8, 1985, affirmi.g the judgment of the United States District Court for the District of Connecticut.

This appeal is taken pursuant to 28 U.S.C. § 1254 (2).

FOR DEFENDANTS-APPELLANT
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ATTORNEY GENERAL

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Deputy Attorney General

Barney Lapp
Assistant Attorney General

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CERTIFICATE OF SERVICE

I, Daniel R. Schaefer, attorney for defendant-appellant and member of the Bar of the Supreme Court of the United States hereby certify that on September 18, 1985, copies of the foregoing Notice of Appeal were served on plaintiffs- appellees by mailing one copy each, first-class postage prepaid, to their attorneys: Stanley A. Twardy, Jr., Silver, Golub & Sandak, 184 Atlantic Street, Stamford, Connecticut 06904; and Ralph G. Elliot, Tyler, Cooper & Alcorn, City Place, 35th Floor, Hartford, Connecticut 06103-3488.

All parties required to be served have been served.

I further certify that courtesy copies of the foregoing Notice of Appeal were mailed first-class postage prepaid, on September 18, 1985, to amici curiae Professor Stephen E. Gottlieb, Albany Law School, 80 New Scotland Avenue, Albany, New York 12208; Martin Margulies, University of Bridgeport School of Law, 303 University Avenue, Bridgeport, Connecticut 06601; Martha Stone, Connecticut

Civil Liberties Union Foundation, 32 Grand Street, Hartford, Connecticut 06106; and James A. Wade, Robinson & Cole, One Commercial Plaza, Hartford, Connecticut 06103-3597.

_____

Daniel R. Schaefer
Attorney for Defendant-Appellant
Member of the Bar of the Supreme Court of the United States

CONSTITUTION OF THE UNITED STATES

ARTICLE I,

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

FIRST AMENDMENT,

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of

the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

TENTH AMENDMENT,

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FOURTEENTH AMENDMENT,

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SEVENTEENTH AMENDMENT,

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite

for electors of the most numerous branch of the State legislatures. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

CONNECTICUT GENERAL STATUTES, REV. TO 1985
(Excerpts from State Election Laws)

Sec. 9-56. Application for enrolment by unaffiliated elector. Except as otherwise provided in the case of an elector whose name has not been placed on or has been removed from the enrolment list under section 9-59, 9-60, 9-61 or 9-62, any elector not enrolled on any enrolment list may at any time make a written and signed application for enrolment, in accordance with the requirements of this section, to the registrars of voters. The application shall be effective as of the date of its execution and any person making application for enrolment in such manner shall immediately be entitled to the privileges of party enrolment unless he executes the application for enrolment

after twelve o'clock noon on the last business day before a primary, in which case he shall be entitled to the privileges of party enrolment immediately after the primary or unless he executes the application for enrolment on the day of a caucus or convention, in which case he shall be entitled to the privileges of party enrolment immediately after the caucus or convention. Such application shall include an affidavit sufficient to prove the identity, residence and signature of such applicant, unless it is made in person at the office of the registrars to either registrar or to his deputy, assistants or his appointed clerks, or unless it is made in person at the residence or usual place of business of either registrar or deputy registrar in any municipality in which the registrars do not maintain a permanent office, or unless it is made in person, to the admitting official, on the application form provided in section 9-20, at the time the applicant was admitted as an elector. Either registrar of voters and either of their deputy registrars, assistant registrars or special assistant registrars may take the acknowledge of the affidavit provided for in this section. Each application for enrolment shall be made in duplicate if filed by the applicant and in triplicate if filed by a person other than the applicant. The application and each copy thereof shall be signed or initialed by the registrar, deputy,

assistant or registrar's clerk receiving it, or by such other personnel as such registrar or deputy may appoint for the purpose, showing the date when such application is received and, in the case of an applicant not immediately eligible under section 9-59, 9-60, 9-61 or 9-62 to the privileges accompanying enrolment in the party named in his application, the date upon which such applicant becomes so eligible. If application is made by the applicant in person as hereinbefore provided, the duplicate copy shall be handed to such applicant to such registrar, deputy, assistant or clerk receiving it, at the time such application is made. If such application is mailed by the applicant, such registrar, deputy, assistant or clerk receiving such application shall mail such duplicate copy to such applicant forthwith. If such application is brought to such registrar, deputy, assistant or clerk by any person other than the applicant, such registrar, deputy, assistant or clerk receiving such application shall mail a copy thereof to such applicant forthwith and shall hand the other copy to the person filing the application. The form of such application shall be prescirbed by the secretary of the state and, either on the face or on the back of each application form, there shall be printed a copy of section 53a-157. Unless application for enrolment is made pursuant to this section, section 9-12, 9-20 or section

9-23a, at the time of admission as an elector, each applicant for enrolment shall state in his application (1) the street and number, if any, at which he resides, (2) the name of the political party on the enrolment list of which he desires to be enrolled, (3) that he is not a member of or connected with any political party other than that in which enrolment is then being sought by him, (4) the name of the political party, if any, in which he was entolled, or had applied for enrolment, or had an application for enrolment pending, within the period of six months prior to the time of his present application and (5) the date upon which he applied for erasure of his name from the list of such political party in which he was so enrolled, or had so applied for enrolment, or so had an application for enrolment pending, within the period of six months prior to the time of his present application. In municipalities divided into voting districts in which an enrolment session is held in each district thereof under section 9-51, application for enrolment shall be made to the registrar or assistant registrar, as the case may be, in the voting district in which such elector is entitled to vote at the time of making such application. If any registrar or assistant registrar fails to add any name to any such list on written application or adds any name to any such list except as herein provided, he shall be fined not

more than two hundred dollars or imprisoned not more than thirty days or both.

Sec. 9-249a. Order of parties on the ballot label. (a) The names of the parties shall be arranged on the machines in the following order:

(1) The party whose candidate for governor polled the highest number of votes in the last-preceding election;

(2) Other parties who had candidates for governor in the last-preceding election, in descending order, according to the number of votes polled for each such candidate;

(3) Major parties who had no candidate for governor in the last-preceding election;

(4) Minor parties who had no candidate for governor in the last-preceding election;

(5) Petitioning candidates with party designation whose names are contained in petitions approved pursuant to section 9-453o, and

(6) Petitioning candidates with no party designation whose names are contained in petitions approved pursuant to section 9-453o.

(b) Within each of subdivisions (3), (4) and (5) of subsection (a) of this section, the following rules shall apply in the following order:

(1) Precedence shall be given to the party any of whose candidates seeks an office representing more people than are represented by any office sought by any candidate of any other party;

(2) A party having prior sequence of office as set forth in section 9-251 shall be given precedence, and

(3) Parties shall be listed in alphabetical order.

(c) Within subdivision (6) of subsection (a) of this section, candidates shall be listed according to the provisions of section 9-453r.

Sec. 9-256. Filing of sample ballot label with secretary. The clerk of each municipality shall, not less than ten days prior to an election, file with the secretary of the state a sample ballot label identical with those to be provided for each polling place under section 9-255. The secretary of the state shall examine the sample ballot label required to be filed under this section, and if such sample ballot label contains an error, the secretary of the state shall order the municipal clerk to reprint a

corrected sample ballot label or to take other such action as the secretary may deem appropriate.

PART I
GENERAL

Sec. 9-372. Definitions. The following terms, as used in this chapter and sections 9-51 to 9-67, inclusive, 9-169e, 9-217, 9-236 and 9-361, shall have the following meanings:

(B) on and after November 4, 1981, for offices contested at 1981 elections, and on and after November 3, 1982, for offices contested at the November 2, 1982, election and all subsequent elections, "major party" shall mean a political party or organization whose candidate for governor at the last-preceding election for governor received, under the designation of that political party or organization, at least twenty per cent of the whole number of votes cast for all candidates for governor;

(11) "Primary" means a meeting of the enrolled members of a political party held during consecutive hours at which such members may, without assembling at the same hour, vote by secret ballot for candidates for nomination to office or for town committee members or delegates to conventions;

PART II

PARTIES ENTITLED TO PLACE ON BALLOT

Sec. 9-379. Eligibility for placing on ballot. No name of any candidate shall be printed on any official ballot at any election except the name of a candidate nominated by a major or minor party unless a nominating petition for such candidate is approved by the secretary of the state as provided in sections 9-453a to 9-453p, inclusive.

PART III

NOMINATION OF CANDIDATES

A

MAJOR PARTIES

Sec. 9-381. Nomination procedure. The provisions of section 9-382 to 9-450, inclusive, shall apply to the nomination by a major party of any candidate for an elective office, including an office established after the last-preceding election, and to the selection in any municipality by a major party of town committee members or delegates to conventions.

Sec. 9-381a. Election procedures applicable to primaries unless otherwise provided. Except as otherwise provided by statute, the provisions of the general statutes concerning porcedures relating to regular elections shall apply as nearly as may be, in the manner prescribed by the secretary of the state, to primaries held under the provisions of this chapter.

Sec. 9-382. Party-endorsed candidates; state or district office. The state or district convention, as the case may be, shall, in a manner conforming with applicable law and with the rules of the party calling such conventions, choose a candidate for nomination to each of the state or district offices, as the case may be. No such convention shall choose more than one candidate for nomination to any such office. Candidates so chosen shall run in the primary of such party as party-endorsed candidates, except as provided in section 9-416.

Sec. 9-400. Filing of candidacies; state or district office. (a) Within fourteen days following the close of the state convention, a candidacy for nomination by a political party to a state office may be filed by or on behalf of any person whose name appears upon the last-completed enrolment list of such party in any municipality within the

state and who has received at least twenty per cent of the votes of the convention delegates present and voting on any roll-call vote taken on the endorsement or proposed endorsement of a candidate for such state office, whether or not the party-endorsed candidate for such office received a unanimous vote on the last ballot, by the filing with the secretary of the state, of a certificate, signed by such candidate and attested by either (1) the chairman or presiding officer, or (2) the secretary of the convention, that such candidate received at least twenty per cent of such votes, and that he consents to be a candidate in a primary of such party for such state office. Such certificate shall specify the candidate's name, his full residence address and the title of the office for which his candidacy is being filed. Except as provided in section 9-416a, upon the expiration of the fourteen-day period, if one or more candidacies for such state office have been filed pursuant to the provisions of this section, the secretary of the state shall notify all town clerks in accordance with the provisions of section 9-433, that a primary for such state office shall be held in each municipality in accordance with the provisions of section 9-415.

(b) Within fourteen days following the close of the district convention, a candidacy for nomination by a political

party to a district office may be filed by or on behalf of any person whose name appears upon the last-completed enrolment list of such party within any municipality or part of a municipality forming a component part of such district and who has received at least twenty per cent of the votes of the convention delegates present and voting on any roll-call vote taken on the endorsement or proposed endorsement of a candidate for such district office, whether or not the party-endorsed candidate for such office received a unanimous vote on the last ballot, by the filing with the secretary of the state of a certificate signed by such candidate and attested by either (1) the chairman or presiding officer, or (2) the secretary of the convention, that such candidate received at least twenty per cent of such votes, and that he consents to be a candidate in a primary of such party for such district office. Such certificate shall specify the candidate's name, his full residence address and the title and district of the office for which his candidacy is being filed. Except as provided in section 9-416a, upon the expiration of the fourteen-day period, if one or more candidacies for such district office have been filed pursuant to the provisions of this section, the secretary of the state shall notify all town clerks within the district, in accordance with the provisions of section 9-433, that a primary for such district

office shall be held in any municipality or each part of any municipality within the district in accordance with the provisions of section 9-415.

Sec. 9-416. No-contest nominations; state or district office. If at a state or district convention no person other than a party-endorsed candidate has received at least twenty per cent of the votes of the delegates present and voting on any roll-call vote taken on the endorsement or proposed endorsement of a candidate for a state or district office, or if within the time specified in section 9-400, no candidacy for nomination by a political party to such office has been filed by or on behalf of a person other than a party-endorsed candidate in conformity with the provisions of sections 9-400 to 9-414, inclusive, no primary shall be held by such party for such office and the party-endorsed candidate for such office shall be deemed to have been lawfully chosen as the nominee of such party for such office.

Sec. 9-431. Eligibility to vote at primary. No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be, but any such person offering to vote and being challenged as to his identity or residence shall, before he votes, prove by

the testimony, under oath, of at least one other elector qualified to vote in such primary or by such other evidence acceptable to the moderator either of the following which are applicable: (1) His identity with the person on whose name he offers to vote or (2) his bona fide residence in the municipality or voting district, as the case may be, provided if any person who has moved from one voting district or ward to another voting district or ward within a municipality is entitled to vote in such primary under section 9-54, such person shall not be required to prove his bona fide residence in the voting district or ward from which he moved. The rules of each party in each municipality shall prescribe whether members of the town committee shall be elected from the municipality at large, in which case any person on the last-completed enrolment list of such party in such municipality shall be eligible to vote in a primary for the election of such committee members, or whether such committee members shall be elected from political subdivisions of such municipality, in which case only persons on the last-completed enrolment list of such party in such a political subdivision shall be eligible to vote in a primary for the election of such committee members from such political subdivision; provided no town committee in any municipality shall be elected both at large and from political subdivisions.

Sec. 9-441. Compensation of registrars and municipal clerks. For the performance of the duties imposed by this chapter, each registrar and deputy registrar actually engaged therein and each municipal clerk shall receive such reasonable compensation from the municipality as is approved by the selectmen of the town, the warden and burgesses of the borough or the common council of the city or the consolidated town and city, as the case may be; and all necessary expenses incurred by registrars and municipal clerks under the provisions of said sections shall be paid by the municipality.

Sec. 9-444. Determination of nominee, committee members or delegates. In the case of a primary for state or district office, each person certified by the secretary of the state as provided in section 9-440, to have received the greatest number of votes of the members of the political party holding a primary for any office shall be deemed to have been chosen as the nominee of such party to such office. In the case of a primary for district delegates, each person on the slate certified by the secretary of the state to have received the greatest number of votes of the members of the political party holding a primary for such positions shall be deemed to have been elected as such delegates. In case of a primary for a municipal office, the moderator, or the head moderator, as the

case may be, shall declare nominated the person having the greatest number of votes for such office, and if more than one person is to be nominated for the same office, he shall declare nominated the persons having the greatest number of votes for such office up to the number to be chosen. In the case of a primary for members of a town committee, such moderator shall declare elected the persons having the greatest number of votes for such positions up to the number to be chosen for such positions. In the case of a primary for delegates to a convention other than district delegates, such moderator shall declare elected each person on the slate having the greatest number of votes for such positions. In all primaries, a plurality of the votes cast shall be sufficient to nominate or elect, as the case may be.

UNIVERSITY OF ILLINOIS
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June 15, 1984

The Honorable Jose A. Cabranes
Judge, United States District Court
District of Connecticut
450 Main Street
Hartford, CT 06103

Re: Republican Party v. Tashjian
Civ. No. H 84-584

Dear Judge Cabranes:

I am honored to have been invited to participate as an amicus in the above-captioned case. However, because I am not an institutional litigant and my personal resources are limited, I am simply unable to participate in the case as fully as I would like to.

I have read the papers sent to me by Deputy Attorney General Gerson pursuant to your court order of May 23d, 1984, and, as a Professor of Constitutional Law, I do not believe that the U.S. Constitution invalidates the state law at issue here. The state law has no extraterritorial application; it does not discriminate against any party nor does it discriminate on the basis of race, religion, sex or poverty. I also find it quite relevant that the State has not placed any unduly high burdens on any person who wishes to become a registered party member and vote in the primary: I understand that State law allows any voter to register as a party member up until the day before a primary election.

The present state law does not restrain the Republican Party from selecting candidates with bipartisan support. See Plaintiffs' Memorandum of May 20, 1984, at 8. The qualified voters in the primary can vote for whomever they wish.

Moreover, new Rule: "Article IV a PRIMARIES" does not open up all Republican primaries; it only opens up primary elections for certain electoral offices. If a primary election for the office of U.S. Senator takes place at the same time as a Primary election for city mayor or State Senator, for example, then the

burden on state election judges may well be heavy and the confusion on the voters great. And, if the Republican Party can, unilaterally, impose such burdens on state primaries, then the Democratic Party should also be able to impose its own rules contrary to state law.

The principle advocated by the plaintiff in this case seems to be that any state political party can invalidate all (or a portion) of any state law to which it objects. Even though a nonparty member could not force an open primary and invalidate the law, the political party could, if it chooses to do so. This principle does not find support in the case law.

I regret that I am unable to pursue these issues further, but I am honored to have been invited to participate. I hope that I have been of some assistance.

Sincerely,

/s/

Ronald D. Rotunda
Professor of Law

RDR:blm

cc: Council of Record and
Invited Potential Amici

(REPRINT)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. MCKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,	:	
PLAINTIFFS,	:	CIVIL ACTION NO. H 84-548 (JAC)
V.	:	
JULIA H. TASHJIAN, Secretary of the State of the State of Connecticut,	:	
DEFENDANT.	:	JUNE 5, 1984

JOINT STATEMENT OF FACTS

The plaintiffs, through counsel, and the defendant, through counsel, pursuant to this Court's Scheduling Order dated May 16, 1984, submit the following statement of facts as to which they agree there are no genuine issues to be tried.

The parties hereby reserve all objections which they may have as to the relevance, materiality or probative value of any fact contained herein.

The parties agree as to the existence of the following:

1. As of October, 1983, there are 659,268 registered Democrats, 532,723 registered but unaffiliated voters and 425,695 registered Republican voters in Connecticut.

2. The plaintiff Republican Party of the State of Connecticut ("Republican Party") is a major political party within the meaning of Sections 9-372 et seq. of the Connecticut General Statutes.

3. The Republican Party is an association of individuals for the common advancement of political beliefs and ideas and for the election of its candidates to public office.

4. The Preamble to the Convention and Committee Rules of the Republican Party of the State of Connecticut provides that:

> Among the goals of the Republican Party of Connecticut are to seek out, designate, and secure the election of, qualified candidates for public office at the Federal, State and Local Levels of government ....

> In its stance as a statewide political organization, dedicated to governmental improvement on all levels, the Republican Party of Connecticut encourages fullest voter participation in its activities ....

A complete copy of the Preamble is included as Exhibit A in the Joint Submission of Documents.

5. The plaintiff Lowell P. Weicker, Jr. ("Weicker") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff Republican Party. He is a United States Senator from the State of Connecticut.

6. The plaintiff Stewart B. McKinney ("McKinney") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff Republican Party.

He is a United States Representative from the State of Connecticut and is a candidate for party endorsement by the Republican Party Fourth Congressional District Convention for renomination and re-election to the office of United States Representative in November, 1984.

7. The plaintiff Nancy L. Johnson ("Johnson") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff Republican Party. She is a United States Representative from the State of Connecticut and is a candidate for party endorsement by the Republican Party Sixth Congressional District Convention for renomination and re-election to the office of United States Representative in November, 1984.

8. The plaintiff Thomas J. D'Amore, Jr. ("D'Amore") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff Republican Party. He is the Chairman of the Republican State Central Committee, the body designated by the Party to, inter alia, implement the Party rules.

9. The defendant Julia H. Tashjian ("Secretary of the State") is the Secretary of the State of the State of Connecticut. Pursuant to Sections 9-3 and 9-4 of the Connecticut General Statutes, she is the Commissioner of Elections of the State of Connecticut and, pursuant to statute, is charged with certain duties pertaining to elections and primaries in the State of Connecticut, including,

inter alia, the administration of Section 9-431 of the Connecticut General Statutes.

10. Pursuant to a resolution passed by the members present at the August 23, 1983 meeting of the Republican Party's State Central Committee, a subcommittee was established to study and recommend changes in the party's rules to improve the party's chances of winning general elections and to improve the two party system.

11. The plaintiffs would offer testimony that this subcommittee concluded that the Republican Party would: increase its chances of winning general elections; nominate candidates with greater bipartisan support; increase the

involvement of unaffiliated voters in the electoral process in general; and strengthen the two party system by allowing unaffiliated voters to participate in Republican Party primaries. Defendants stipulate that, subject to the right to raise objections as reserved on page one, this evidence is admissible.

12. Based upon the recommendations of this subcommittee, and in accordance with Section 9-384 of the Connecticut General Statutes and applicable party rules and resolutions, Republican Party Chairman D'Amore called and noticed a state party convention to consider, inter alia, "proposed changes [in party rules] to allow unaffiliated voters to vote in Republican candidate selection primaries."

13. On January 14, 1984, at a duly called, noticed and conducted state party convention, the Republican Party approved an amendment (the "Rule") to its party rules to allow unaffiliated voters to associate, participate and join with enrolled Republicans in voting in Republican Party primaries for candidates for the offices of United States Senator, United States Representative, Governor and the gubernatorial underticket. Specifically, the Rule, entitled "Article IVa PRIMARIES", provides as follows:

> Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant

Governor, Secretary of the State, Attorney General, Comptroller and Treasurer.

14. The Convention was called pursuant to Section 9-384 of the Connecticut General Statutes and in accordance with the opinion of the defendant's office dated August 23, 1983. That opinion was in response to a letter on behalf of the plaintiff Republican Party to the defendant dated August 17, 1983. Copies of these letters are included as Exhibits B and C in the Joint Submission of Documents.

15. The Convention was conducted pursuant to a Call, dated October 6, 1983. A copy of that Call is included as Exhibit D in the Joint Submission of Documents.

16. The Rule approved by the plaintiff Republican Party was one of a number of resolutions which came before, and were acted upon by, the delegates to said state party convention. The minutes of that convention are included as Exhibit E and the resolutions are included as Exhibits F through N in the Joint Submission of Documents.

17. In accordance with Section 9-374 of the Connecticut General Statutes, a copy of the Rule approved and adopted by the Republican Party at the state convention, together with a copy of the complete party rules incorporating such Rule, was filed with the Office of the Secretary of the State of the State of Connecticut on January 23, 1984.

18. Plaintiff contends that this Rule became effective on March 23, 1984 pursuant to Section 9-374 of the Connecticut General Statutes. Defendant acknowledges that the plaintiff filed the Rule together with such copy, as stated in Paragraph 17, but denies that the Rule became effective because it is in conflict with Section 9-431 of the Connecticut General Statutes.

19. Section 9-431 of the Connecticut General Statutes provides, in relevant part, that:

> No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be ....

20. Because Section 9-431 of the Connecticut General Statutes prohibits the plaintiff Republican Party from implementing its Rule to allow unaffiliated voters to participate in primaries in accordance with the party Rule, Republican legislators attempted to have the statute amended during the 1984 session of the Connecticut General Assembly.

21. In February, 1984, proposed legislation was introduced by State Representative Mae Schmidle in the Connecticut General Assembly which would have enabled the Republican Party to implement its Rule. Specifically, this legislation, which was assigned Raised Committee Bill No. 5525 and referred to the Committee on Government Administration and Elections,

would have amended Section 9-431 of the Connecticut General Statutes by providing, in relevant part, that:

> EXCEPT WHERE PROVIDED OTHERWISE BY STATE PARTY RULES, no person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be ....

A copy of the complete Bill is included as Exhibit O in the Joint Submission of Facts.

22. On March 7, 1984 the Committee on Governmental Administration and Elections voted 13 to 8 against Raised Committee Bill No. 5525, thereby rejecting the proposed legislation. The Committee further voted 12 to 9 against reporting the Bill

out of Committee with an unfavorable report, thereby preventing the proposed legislation from being considered by the entire General Assembly. Thereafter, on March 15, 1984, the Committee voted to reconsider its earlier vote on the Bill and voted to send the Bill to the House of Representatives with an unfavorable report, thereby indicating to the members of the House that the Committee was opposed to the Bill, but allowing the Bill to be considered by the members of the House. However, the Bill never came before either House of the General Assembly for a Vote.

23. Albert P. Lenge, Director/Elections Attorney in the Office of the Secretary of the State of the State

of Connecticut, testified at a hearing held by the Committee on Governmental Administration and Elections on February 28, 1984 concerning the issue of implementation of the provisions of the Schmidle Bill, Raised Committee Bill No. 5525. A copy of his testimony is included as Exhibit P in the Joint Submission of Documents.

24. On April 11, 1984, the Connecticut House of Representatives defeated two amendments to House Bill No. 5105, "An Act Concerning the Time Limit for Enrollment of Unaffiliated Voters", each of which provided in pertinent part that:

> Where state party rules so provide, an elector whose name does not

> appear on any enrolment list shall be entitled to vote in a primary conducted by such party for nomination for election to the office of governor, lieutenant governor, secretary of the state, treasurer, comptroller, attorney general, senator or representative in Congress or state senator or state representative.

One Amendment, which was assigned letter "B", was defeated by a vote of 92 to 54, with 83 Democrats voting against the Bill and none in favor, and 9 Republicans voting against the Bill and 54 in favor. The second amendment, which was assigned letter "F", was defeated by a vote of 93 to 54, with 85 Democrats voting against the Bill and none in favor, and 8 Republicans voting against the Bill and 54 in favor. The complete amendments are included as Exhibits Q and R, respectively, in the Joint Submission of Documents.

25. At the time of the vote, there were 87 Democrats and Republicans in the Connecticut House of Representatives.

26. On April 19, 1984, the Connecticut Senate voted 23 to 13 against Senate Amendment Schedule "A" to Substitute House Bill No. 5105, "An Act Concerning the Time Limit for Enrollment of Unaffiliated Voters", which incorporated the provisions of the Schmidle Bill, Raised Committee Bill No. 5525, thereby defeating the proposal to allow the Republican Party to implement its Rule. Twenty-three Democrats voted against the Amendment and none voted in favor. No Republicans voted against the Amendment and thirteen voted in favor. A copy of the Amendment is included as Exhibit S in the Joint Submission of Documents.

27. At the time of the vote, there were 23 Democrats and 13 Republicans in the Connecticut Senate.

28. The Republican Party and Democratic Party of Connecticut are the only "major" political parties, as defined in Section 9-372(5) of the Connecticut General Statutes, in Connecticut.

29. Neither House of the Connecticut General Assembly voted on any other legislation which would have enabled the Republican Party to implement its Rule during the remainder of the 1984 session of the General Assembly, which adjourned on May 9, 1984.

30. Plaintiffs Stewart B. McKinney and Nancy L. Johnson are registered members of the Republican Party and are

United States Representatives from the State of Connecticut. Both Congressman McKinney and Congresswoman Johnson will seek reelection at the November 1984 general election and, as such, are seeking the endorsement of their respective Republican Party Congressional District Conventions for renomination to their offices.

31. Pursuant to Section 9-423 of the Connecticut General Statutes, any primaries for party nominations for the office of United States Representative would be scheduled for September 11, 1984.

32. Although the Republican Party Rule would allow the participation of unaffiliated voters in a primary for

United States Representative, Section 9-431 of the Connecticut General Statutes would not.

33. In the event that primaries are qualified for and held for Republican Congressional nominations in either the Fourth and/or Sixth Congressional Districts, and in the event that Congressman McKinney and/or Congresswoman Johnson are candidates in such primaries, Section 9-431 would prevent Congressman McKinney and/or Congresswoman Johnson from seeking nomination in primaries in which unaffiliated voters may vote pursuant to the Republican Party Rule.

34. Plaintiffs would offer evidence that for Congressman McKinney, Congresswoman Johnson and other candidates

for the Republican nominations for United States Representatives to properly plan and conduct their campaigns for nomination and re-election to office they must know whether the Republican Party will be allowed to implement its Rule providing for unaffiliated voters to participate in these primaries. Defendants stipulate that, subject to the right to raise objections as reserved on page one, this evidence is admissible.

35. The defendant Secretary of the State has administered the provisions of Section 9-431 of the Connecticut General Statutes in the past and will continue to do so in the future.

36. In 1955 the Connecticut General Assembly enacted a "challenge" primary

law, now codified as Section 9-372 et seq. of the Connecticut General Statutes.

37. Under this primary law, party endorsements for state and district offices (offices which encompass two or more towns or parts thereof) occur at a party convention. Conn. Gen. Stat. § § 9-372(3), 9-382.

38. Delegates to conventions are endorsed in the municipalities and are subject to primary. Conn. Gen. Stat. § § 9-390, 9-407. Only enrolled party members may vote in these primaries.

39. Should an unsuccessful candidate for endorsement for state or district office receive on any roll call convention vote at least twenty percent of the number of the votes of the convention

delegates present and voting, he becomes eligible to file as a challenge candidate in a primary against the party endorsed candidate. Conn. Gen. Stat. § 9-400. If no unsuccessful candidate for endorsement receives the requisite twenty percent or if such a candidate does receive twenty percent but declines to file for a primary, no primary is held and the convention endorsed candidate becomes the party nominee.

40. Such party primaries, if necessary, are held at the expense of the State and the political subdivisions thereof.

41. Section 9-431 of the Connecticut General Statutes provides that only those on the last completed political party

enrollment list are eligible to vote in such primaries.

42. The only office on the primary ballot to which the Republican Party Rule would apply in 1984 is for United States Representative.

43. In case of any such primary in 1984, there may also be primaries for state senator, state representative, and registrar of voters occurring at the same time.

44. Under the Republican Party Rule, unaffiliated voters would not be permitted to vote in primaries for state senator, state representative, or registrar of voters.

45. The party primaries for all major political parties in the State of

Connecticut, including the Democratic and Republican Parties, are held on the same day, during the same hours and at the same polling places. Under present law and procedure, separate voting machines are used for each party on primary day.

46. It is possible that there will be on the same ballot Republican Party primaries for offices (e.g., Congress) for which unaffiliated voters may vote under the Rule, together with offices (e.g., state senator, state representative) for which they may not vote.

In such instances, special procedures will be necessary, as a practical matter, if the Republican Party Rule becomes effective. These procedures will, among other things, require that separate

and distinct ballot labels be provided for unaffiliated electors either on the same or separate and additional voting machines. In addition, election officials, including voting machine mechanics and voting machine tenders, will require special training.

47. Furthermore, unaffiliated voters will have to be separated from enrolled members of other major political parties, including the Democratic Party, because they will not be permitted to vote on any Democratic ballot.

48. In all towns where primaries are held for offices for which unaffiliateds may participate under the party Rule, additional officials, as well as additional voting machines may, in many cases, be necessary to accomodate these voters.

49. Present state law does not make any provisions, including procedural ones, for such unaffiliated voting, e.g., separate ballot labels or separate machines, number of machines, position of offices on ballots, and voter check lists.

50. Where primaries are held for offices for which unaffiliated electors may vote under the party Rule, together with those offices for which they may not vote, special "unaffiliated" absentee ballots will be required if the Rule becomes effective. See Conn. Gen. Stat. § § 9-133e, 9-135a.

51. No provision is made under State law for such unaffiliated absentee ballots. Authorized primary absentee

ballots are designed by the Secretary of State and printed and paid for by the town.

52. If the Rule becomes effective, defendant will offer testimony that there will be a question as to which ballot the town clerk should send to an unaffiliated voter who requests one for a Republican primary. This question will be due to uncertainty as to what that voter's status will be on primary day. See Conn. Gen. Stat. § § 9-133d, 9-140. Plaintiffs stipulate that, subject to the right to raise objections as reserved on page one, this evidence is admissible.

53. Sections 9-54 and 9-55 of the Connecticut General Statutes require political party enrollment lists to be

maintained. State law makes no provisions for lists of unaffiliated electors to be available at the polls on the primary day. The party rule is silent regarding development of such unaffiliated lists.

54. Connecticut Public Act 84-118 has been signed by the Governor and becomes effective on January 1, 1985. It provides that party enrollment may occur up until the day before a primary.

55. To become affiliated with a political party, an unaffiliated voter need only sign an application for enrollment form and present it to the local Registrar of Voters.

56. The State Register and Manuals may be utilized as competent and

authentic evidence of voting and registration statistics for the purposes of this case.

57. The Democratic Party of the State of Connecticut, which is the only other major political party in Connecticut at this time within the meaning of Section 9-372, does not have a rule which is in conflict with Section 9-431 or any other similar provision concerning voter eligibility in party primaries. Unaffiliated voters cannot vote in Democratic Party primaries.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT; LOWELL P. WEICKER, JR.; STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.	:	
	:	CIVIL NO. H
V.	:	84-548
JULIA H. TASHJIAN, Secretary of State of the State of Connecticut	:	

RULING ON MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

Plaintiffs filed a motion for summary judgment, pursuant to Rule 56, Fed. R. Civ. P., on June 13, 1984, and defendant filed a motion to dismiss, pursuant to Rule 12(b)(6), Fed. R. Civ. P., on June 15, 1984. The court heard oral argument

on both motions at a hearing held July 5, 1984.

It is well-established that if materials outside the pleadings are presented on a motion to dismiss under Rule 12(b)(6), and the court receives those materials in the exercise of its discretion, the motion must be treated as one for summary judgment and disposed of as provided in Rule 56. Rule 12(b), Fed. R. Civ. P.; 2A Moore's Federal Practice ¶ 12.09 (2d ed. 1984); see Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070, 1086 (2d Cir. 1982); Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980).

Defendant relies on the Joint Statement of Facts (filed June 6, 1984) and

Joint Submission of Documents (filed June 6, 1984), as well as a variety of other materials outside the pleadings -- for example, the transcript of a public hearing before the 1984 Connecticut General Assembly Government Administration and Election Joint Standing Committee, see Memorandum in Support of Motion to Dismiss (filed June 21, 1984) at 33-34. Accordingly, the court will treat defendant's motion as one for summary judgment.

A case is appropriate for summary judgment only if there is no "genuine issue as to any material fact" and the moving party is "entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P.; See Schering Corp. v. Home

Insurance Co., 712 F.2d 4, 9 (2d Cir. 1983); Schwabenbauer v. Board of Education, 667 F.2d 305, 313 (2d Cir. 1981). Moreover, there can be no controversy as to the inferences to be drawn from the facts in evidence. Schwabenbauer, supra, 667 F.2d at 313; see Phoenix Savings & Loan, Inc. v. Aetna Casualty & Surety Co., 381 F.2d 245, 249 (4th Cir. 1967).

In this action, the parties have been unable to stipulate to the absence of disputed facts. Defendant does not concede that a subcommittee of the Republican State Central Committee concluded that the party would

> increase its chances of winning general elections; nominate candidates with greater bipartisan support; increase the involvement of

> unaffiliated voters in the electoral process in general; and strengthen the two party system by allowing unaffiliated voters to participate in Republican Party primaries.

Joint Statement of Facts, supra, ¶ 11.

Defendant also disputes that

> for Congressman McKinney, Congresswoman Johnson and other candidates for the Republican nominations for United States Representative to properly plan their campaigns for nomination and re-election to office they must know whether the Republican Party will be allowed to implement its Rule providing for unaffiliated voters to participate in these primaries.

Id. ¶ 34. Plaintiffs contest defendant's assertion that

> if the Rule becomes effective . . . there will be a question at to what ballot the town clerk should send to an unaffiliated voter who requests one for a Republican primary.

Id. ¶ 52.

The court is not persuaded that it can, at this stage of the lawsuit and in the circumstances presented, enter judgment for either side. Accordingly, the motions for summary judgment are hereby denied. Before the court is able definitively to consider the merits of the issues presented, a trial must be held to resolve these disputed issues of fact. In determining the advisability, if not necessity, of proceeding to trial, the court intimates no view on the merits of the arguments of either party to this lawsuit.

The court is mindful of the need to consider these matters expeditiously, in

light of the possibility that primaries for nominations subject to the Republican Party rule in question may be held on September 11, 1984. Accordingly, the court has established a schedule for expedited pretrial discovery on the only issues arguably in dispute. An evidentiary hearing shall be held on July 25, 1984 at 10:00 A.M. Counsel for each side are directed to submit proposed findings of fact with respect to the issues noted by no later than August 1, 1984.

It is so ordered.

Dated at Hartford, Connecticut, this 6th day of July, 1984.

/s/ Jose A. Cabranes
Jose A. Cabranes
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.	CIVIL ACTION NO.
PLAINTIFFS,	H-84-
v.	
JULIA H. TASHJIAN, Secretary of the State of the State of Connecticut	548 (JAC)
DEFENDANT.	JULY 24, 1984

SUPPLEMENTAL JOINT STATEMENT OF FACTS

The plaintiffs, through counsel, and the defendant, through counsel, hereby stipulate and agree that paragraphs 11, 34 and 52 contained in their Joint

Statement of Facts, filed June 6, 1984, may be withdrawn.

In addition, the parties hereby supplement their Joint Statement of Facts by submitting the following facts as to which they agree there are no genuine issues to be tried:

10a. The resolution passed by the State Central Committee at the August 23, 1983 meeting provided as follows:

> Be it resolved that the Republican State Central Committee empower Chairman Thomas J. D'Amore with the ability to appoint a fifteen (15) member by-laws revision committee consisting of representatives of the Republican State Central Committee, representatives from various town committees, and representatives from the category of elected officials, both past and present.
>
> Such committee to be chaired by an appointment of Chairman D'Amore from the membership of said committee.

The committee will convene as quickly as possible upon the call of its' chairman to deliberate the amending of the by-laws of the Connecticut Republican State Committee to allow unaffiliated voters the right to participate in Republican Party activities, such as primaries, to allow for a revision of our present convention system structure, and any other by-laws revisions deemed necessary. Said revisions would then be acted upon at a special state convention called for that express purpose.

Said committee shall report back to Chairman D'Amore with its' findings and recommendations so that a report can be made to the State Central Committee meeting of September 1983.

This resolution was approved by a voice vote of the members present at the meeting following the rejection, by a voice vote, of a proposed amendment which would have given the subcommittee until October 1983 (instead of September 1983)

to submit its' findings and recommendations.

11. The subcommittee appointed by Chairman D'Amore pursuant to the State Central Committee resolution met three times in September 1983.

By a vote of 11 in favor to one against, the subcommittee approved the following resolution:

> RESOLVED: that it is the recommendation of the [subcommittee] that the State Central Committee instruct the Republican State Chairman to call a convention of the Republican Party in accordance with applicable provisions of the party rules and the Connecticut General Statutes to provide for the revision of the party rules to permit unaffiliated voters to vote in Republican primaries; and that the State Central Committee explore such other changes in the law, or action through the courts, as the State Central Committee shall deem appropriate to accomplish this purpose.

In addition, by a vote of 12 in favor to one against, the subcommittee approved the following resolution:

> RESOLVED: that it is the recommendation of the [subcommittee] that the State Central Committee instruct the Republican State Chairman to call a convention of the Republican Party in accordance with applicable provisions of the party rules and the Connecticut General Statutes to consider the selection of Republican candidtates for office by direct primary instead of convention; and to explore other such changes in the law, or action through the courts as the State Central Committee shall authorize to accomplish this purpose.

11a. The Republican State Central Committee, at its September 29, 1983 meeting, by a vote of 52 in favor and 7 against, approved a action providing that it:

receive [the] report of the

> [subcommittee], with thanks, and that [it] request the State Chairman to call a State Convention before February 15, 1984 for the purpose of considering the recommended changes to the by-laws, plus any other changes that may be deemed necessary.

The member of the State Central Committee making this motion had originally utilized the word "accept" instead of "receive". However, he voluntarily modified his original motion after discussion so that the motion, as approved, provided as stated above.

* * * * * *

52. If the Rule becomes effective, there will be a question as to what ballot the town clerk should send to an unaffiliated voter who requests one for a

Republican primary. This question will be due to uncertainty as to what that voter's status will be on primary day. See Conn. Gen. Stat. §§ 9-133d, 9-140.

The parties hereby reserve all objections which they may have as to the relevance, materiality or probative value of any fact contained herein.

THE PLAINTIFFS

s/Stanley A. Twardy
BY_____
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s/Elliot F. Gerson
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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, ET AL.,	:	
Plaintiffs,	:	CIVIL ACTION
vs.	:	NO. H 84-548
JULIA H. TASHJIAN, SECRETARY OF THE STATE OF THE STATE OF CONNECTICUT,	:	JULY 10, 1984
Defendant.	:	

ANSWERS TO INTERROGATORIES

QUESTION 1. Indicate the name and address of all persons who may testify that if the Rule becomes effective there will be a question as to what ballot the town clerk should send to an unqualified voter who requests a ballot for a Republican primary, as referred to in paragraph 52 of the Joint Statement of Facts.

ANSWER 1. Attorney Albert P. Lenge, Elections Attorney, and/or Attorney Deborah Dickson Shapiro, Assistant Elections Attorney, both of the Office of the Secretary of the State, Election Divison, 30 Trinity Street, Hartford, Connecticut 06106. Defendant, in lieu of or in addition to testimony, also reserves the right to request the court to take judicial notice of the existing statutory procedure and the difficulties that would result if the plaintiffs' "rule" were enforced.

QUESTION 2. State the precise manner in which it is anticipated that town clerks will respond to requests from unaffiliated voters for an absentee

ballot for a primary for either party pursuant to Connecticut Public Act 84-118, including, but not limited to, the type of ballot to be sent to unaffiliated voters.

ANSWER 2. It is anticipated that, pursuant to §§ 9-133a through 9-133e and § 9-140, none of which were amended by Public Act 84-118, town clerks will, beginning on the 19th day before a primary, issue absentee ballots upon application properly made, such ballots to be issued either by first class mail addressed to the applicant, or in person at the town clerk's office to the applicant or (where applicable under §§ 9-140 and 9-146 as amended by Public Act 84-319) to the

applicant's designee. It is anticipated that an unaffiliated voter applying for a Democratic primary absentee ballot, as is indicated on the application form provided for in § 9-140, would be issued such a ballot listing all offices being contested at such primary in such voter's voting district. This is currently the proper practice as unaffiliated voters may enroll up to and including the 14th day before the primary and ballots are available beginning the 19th day. In addition, persons who are not yet electors, may become electors and enroll up to and including the day before the primary due to the "matured rights" provision of § 9-23a and to the fact that cross-town applicants under § 9-19e may

vote in the primary if application is made by the 14th day even though it is approved by the town of residence after such 14th day. If plaintiffs' "rule" is required to be enforced, it is anticipated that an unaffiliated voter applying for a Republican primary absentee ballot would be issued either (a) such a ballot listing only those offices being contested at the primary in such voter's voting district for which such voter is eligible to vote under the Rule, or (b) more likely, such a ballot listing all offices being contested at such primary in such voter's voting district notwithstanding such voter's restricted eligibility to vote under the Rule. Public Act 84-118 does not alter the absentee ballot

issuance procedure; but if the Rule is upheld, said Act will have the effect of expanding (through the day before the primary) the period of time during which an unaffiliated voter who has applied for a Republican absentee ballot may subsequently obtain full eligibility, unrestricted by the Rule, to vote in Republican primaries by enrolling as a Republican.

QUESTION 3. State the precise manner in which the question of what ballot should be sent in response to a request from an unaffiliated voter for an absentee ballot for a Republican primary would differ from that for a request for an absentee ballot from an unaffiliated voter for a

primary in either party pursuant to Connecticut Public Act 84-118.

ANSWER 3. Under Public Act 84-118, absent the Rule, there is no question as to what absentee ballot should be issued to an unaffiliated voter applying for a primary absentee ballot of either party: such a voter would be issued such party's ballot applicable to his voting district; if such ballot is returned and such voter enrolls in such party by the deadline the full ballot will be counted; if the ballot is returned and the voter does not so enroll, the ballot will not be counted. (The checking of the ballot's outer envelope against the final supplementary enrollment lists will determine, prior to

counting, whether the voter has so enrolled). The question arises only under the Rule. Because the Rule does not affect eligibility to vote at Democratic primaries, the foregoing procedure would continue to apply to unaffiliated voters applying for Democratic primary ballots: the full ballot is sent, and it is subsequently either counted in full or not counted at all, depending on whether the unaffiliated voter has enrolled as a Democrat. Because the Rule does affect eligibility to vote in Republican primaries, the question arises for Republican primaries only: should an unaffiliated voter be issued a ballot listing only those offices for which he is eligible to vote at the time of application (thus

potentially disfranchising him in part, in the event he subsequently enrolls); or should he be sent a full ballot (thus potentially allowing him to vote for more offices than permitted under the Rule, in the event he does not enroll)? This is the precise manner in which the question of what ballot should be issued differs depending on the party, not under Public Act 84-118 but under the Rule. (The Act merely extends the time period during which the partially eligible unaffiliated voter may become a fully eligible Republican, if the Rule is upheld).

Most probably, the question would be resolved in favor of issuing a full Republican ballot to unaffiliated voters

applying for Republican primary absentee ballots. Such ballots, when returned sealed in their outer envelopes which show the voter's name and address, would be kept separate from ballots returned by Republicans after checking the names against the appropriate final lists of enrolled Republicans and unaffiliated voters. The Republican voters' ballots and the unaffiliated voters' ballots would then be opened and counted separately on primary day, in two separate and distinct procedures at each of the statutory counting times. All votes on the Republicans' ballots would be counted, but on the unaffiliated ballots only votes for offices permitted under the Rule would be counted. It should be

noted that this procedure is contrary to statute (as is the alternative of issuing different versions of the ballot for Republicans and for unaffiliated voters); would require extreme care in its implementation; would probably result in considerable confusion and official error; and could have the effect of segregating the unaffiliated absentee vote totals from the Republican absentee vote totals on the tally sheets which produce the overall primary returns.